IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHRISTOPHER BOFFOLI, Appellant, v. KEITH and CARMEN ORTON, a marital community; Defendants, and BOAZ and JENI HALL, a marital community, Respondents.	)	No. 63457-7-I DIVISION ONE UNPUBLISHED OPINION FILED: April 19, 2010

MEYER, J.P.T.[*] – Christopher Boffoli filed a complaint for trespass, nuisance, and injunctive relief against his neighbor for producing cigarette smoke that intrudes into his home. The trial court denied Boffoli's demand for a jury trial. After a bench trial, the trial court entered judgment for the defendant. Because Boffoli fails to demonstrate error, we affirm.

[*]Judge John M. Meyer is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

FACTS

In his amended complaint, Boffoli alleged that his neighbors, Boaz and Jeni Hall, "continuously smoke cigarettes on a south-facing front deck of their residence on a daily basis" causing smoke to "regularly intrude onto [his] property" through air intake vents and windows. Boffoli further alleged that he had asked the Halls to remedy the situation and had sent them letters but that the Halls "were unresponsive" and "continued to smoke cigarettes at their residence, thereby causing the secondhand smoke intrusion to [his] home to continue." Boffoli requested specific injunctive relief prohibiting the Halls "from causing cigarette smoke particles and gases to intrude onto [Boffoli's] property, and . . . from allowing their guests or others to smoke on their property at any location from which the secondhand smoke particles and gases will trespass onto plaintiff's property or into his residence, and unreasonably interfere with [Boffoli's] use and enjoyment of his property." Boffoli also sought damages "in an amount to be determined at trial."

On the day of trial, the trial court noted that the thrust of the complaint was an action for equitable relief and denied Boffoli's request for a jury trial. Boffoli and Hall then testified and presented witnesses, other evidence, and argument. After a week's recess to allow the parties a final chance at settlement, the trial court stated, "The Court has concluded that based on the evidence, and the law, that there is no legal authority for the Court to issue this injunction," and dismissed the case.

ANALYSIS

Boffoli first contends that the trial court erred in refusing his jury demand. Boffoli argues that his complaint raised only legal claims because the causes of action, trespass and nuisance, are torts sounding in law. As the trial court recognized, the action presented a "mixed bag" of legal and equitable issues because the primary relief sought by Boffoli—an injunction prohibiting Hall from causing smoke to intrude onto his property—is equitable in nature.

In cases involving both legal and equitable issues, the trial court has wide discretion "'to allow a jury on some, none, or all issues presented.'" Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 367, 617 P.2d 704 (1980) (quoting Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 129, 467 P.2d 372 (1970)). "In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse." Id. at 368. The trial court should consider a variety of factors including, but not necessarily limited to: whether the party seeking equitable relief is also demanding a jury trial; and whether the main issues are primarily legal or equitable in nature, are easily separable, or present complexities for trial. Id. And "'the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues.'" Id. (quoting Scavenius, 2 Wn. App. at 129-30).

Boffoli's reliance on Watkins v. Siler Logging Co., 9 Wn.2d 703, 116 P.2d

315 (1941), is misplaced. In Watkins, the complaint stated a "purely legal cause of action, sounding in tort for conversion, and demand[ed] money damages therefor," but demanded "[n]o equitable relief whatever." Id. at 711. When the defendants demanded a jury trial, the plaintiff moved to strike the jury demand and for a bench trial, claiming that the defenses raised were equitable in nature. On appeal of the trial court's order striking the jury demand, the court noted that only two of several defenses could be classified as equitable, and no defendant sought affirmative equitable relief. Id. at 714. Because nothing in the record supported striking the jury demand, the case was reversed for jury trial. Id. at 714-15.

But here, applying the relevant factors, we conclude that the trial court did not abuse its discretion in denying Boffoli's jury demand. Boffoli is the party who sought equitable relief and demanded a jury. Although Boffoli included a request for damages in his complaint, the record demonstrates that his primary objective was to change the Halls' smoking practices. The complaint first specifically describes the injunctive relief sought, and then includes a general request for damages. In the separately filed statement of damages, Boffoli's first claim for damages for loss of use and enjoyment of his property includes the statement: "This element of damages can be reduced or eliminated by the Halls ceasing smoking in a place and manner that causes secondhand smoke to invade Mr. Boffoli's home." Boffoli's trial brief also states, "This problem could have been resolved amicably at any juncture, and can still be resolved.

Christopher Boffoli has a lingering hope that the Halls will act reasonably, and resolve this problem by stopping ventilating Boffoli's house with smoke." Under these circumstances, Boffoli fails to demonstrate any abuse of discretion in the trial court's decision to treat the matter as largely equitable in nature and hold a bench trial.

Boffoli next argues that the trial court erred by concluding that Washington law has no cause of action for damage caused by cigarette smoking at a private residence. Boffoli claims that the Halls' cigarette smoking constitutes actionable nuisance under RCW 7.48.120, providing:

> Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

But Boffoli fails to identify any Washington cases that have considered whether cigarette smoking for personal enjoyment on the deck of a private residence constitutes actionable nuisance. Although RCW 70.160.075 prohibits smoking within 25 feet of public places and places of employment, the statute specifically states that "[a] public place does not include a private residence." RCW 70.160.020(2). Boffoli does not contend that his own home or the Halls' deck is a public place, or that chapter 70.160 RCW applies to the Halls' smoking. Boffoli acknowledges that the Halls are not smoking "unlawfully."

Although Boffoli does not specifically identify any duty that he contends

the Halls are failing to perform, he suggests they have a duty to prevent any cigarette smoke they produce from entering the windows or air intake vents of his home. But Boffoli provides no authority imposing such a duty on the Halls in these circumstances. While it is true that a lawfully conducted business may constitute a nuisance if its operation unreasonably interferes with another person's use and enjoyment of his property, Boffoli fails to identify any Washington authority applying this rule to a lawfully conducted personal activity such as cigarette smoking at a private residence. See, e.g., Tiegs v. Watts, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). Because Boffoli fails to demonstrate that he has a right to bring a nuisance action against the Halls for smoking cigarettes on their property, he cannot demonstrate error in the trial court's decision to dismiss the claim. See, e.g., Collinson v. John L. Scott, Inc., 55 Wn. App. 481, 488, 778 P.2d 534 (1989) (affirming dismissal of nuisance claim against neighbor for lawfully constructing a building obstructing plaintiff's view).

With regard to trespass, Boffoli relies on RCW 4.24.630 and Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985). To recover under RCW 4.24.630, Boffoli was required to establish that the Halls "intentionally and unreasonably committed one or more acts *and* knew or had reason to know that [they] lacked authorization." Clipse v. Michels Pipeline Const., Inc., __ Wn. App. __, 225 P.3d 492, 496 (2010). Even assuming, without deciding, that Boffoli properly asserted a claim under RCW 4.24.630 when his complaint did not include any reference to that statute, Boffoli did not

allege in the complaint or present evidence at trial that the Halls intentionally and unreasonably smoked cigarettes on their deck knowing or having reason to know that they lacked authorization to smoke cigarettes on their own property.

In Bradley, the defendant smelting company stipulated that it had been aware for nearly 80 years that its smelting process emitted microscopic, airborne particles of heavy metals that were, on occasion, blown over and deposited on the plaintiffs' land. 104 Wn.2d at 681. The Supreme Court held that under the circumstances, the defendant had the requisite intent to commit intentional trespass as a matter of law and that its conduct constituted a trespass. Id. at 684. But Bradley, as well as the cases upon which it relies, involved airborne pollutants produced by manufacturing and industrial operations. Nothing in Bradley indicates that its holding extends to the significantly different setting of the lawful personal activity of cigarette smoking conducted on private property.

Bradley also holds that a plaintiff must demonstrate actual and substantial damages resulting from the accumulation of particles or substances. Id. at 691-92. The cause of action is so limited because "[n]o useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant. Manufacturers would be harassed and the litigious few would cause the escalation of costs to the detriment of the many." Id. at 692. The same public policy concern expressed in Bradley is present here. On this briefing and on this limited record, Boffoli fails to establish an actionable

claim of trespass or demonstrate any error by the trial court.

Affirmed.

Meyer, J.P.T.

WE CONCUR:

Leach, A.C.J.

Dwyer, C.J.